

1                               BEFORE THE SHORELINES HEARINGS BOARD  
2                               STATE OF WASHINGTON

3 GREATER DUWAMISH NEIGHBORHOOD )  
4 COUNCIL, )

5                               Appellant, )

6                               v. )

7 CITY OF SEATTLE, PORT OF SEATTLE, )  
and LAFARGE CORPORATION, )

8                               Respondents. )

SHB No. 89-25

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

9               This matter, the appeal of a shoreline substantial development  
10 permit for the construction of a cement transshipment facility, came  
11 on for hearing in Seattle, Washington, on August 3, 4 and 8, 1989,  
12 before the Board: Wick Dufford, presiding, Judith A. Bendor, Chair,  
13 Harold S. Zimmerman, Nancy Burnett, William Derry and Robert Landles.  
14 The proceedings were reported by Nancy A. Miller, Randi Hamilton and  
15 Edward Howard, court reporters.

16               Shirley Mesher and Blair Pessimier acted as spokespersons for the  
17 Greater Duwamish Neighborhood Council. Robert Tobin, Assistant City  
18

1 Attorney, represented the City of Seattle. William H. Chapman and  
2 Thomas Eli Backer, attorneys at law, represented the Port of Seattle.  
3 David G. Shenton and Jane R. Koler, attorneys at law, represented the  
4 Lafarge Corporation.

5 Witnesses were sworn and testified. Exhibits were admitted and  
6 examined. From the testimony heard and exhibits examined the Board  
7 makes the following:

#### 8 FINDINGS OF FACT

##### 9 I

10 This case arises over a proposal to construct a marine terminal  
11 facility for bulk cement transshipment within the industrial district  
12 of the City of Seattle along the lower Duwamish River. The project is  
13 proposed for property owned by the Port of Seattle on the east bank of  
14 the Duwamish Waterway between mile markers 1.0 and 1.2.

##### 15 II

16 The Greater Duwamish Neighborhood Council (GDNC) has appealed the  
17 City's issuance to the Port of a shoreline substantial development  
18 permit for the project.

19 The GDNC is a nonprofit, unincorporated association created in  
20 the spring of 1988 under the auspices of the City of Seattle's Office  
21 of Neighborhoods. The geographic area covered by the GDNC is sizable,  
22 extending from Dearborn Avenue to the south City limits and from  
23 Beacon Hill to West Marginal Way. The project site is within this  
24 geographic area.

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The GDNC represents both businesses and residential communities with its area. Members of the association personally use the project site for recreational purposes. It is this recreational use which the group asserts will be interfered with by the project.

GDNC's appeal was certified to the Board by the Department of Ecology and the Attorney General's office.

III

In connection with the transshipment facility project, the Port of Seattle acted as lead agency under the State Environmental Policy Act (SEPA). After preparing an environmental checklist, the port issued a Determination of Non-significance (DNS) for the proposal on November 14, 1988. The DNS allowed until December 22, 1988, for public and agency comments.

The DNS was sent to the Department of Ecology for publication in the SEPA register. Notice of the action was mailed to a list of agencies, organizations, and individuals who had requested notification of Port actions. The GDNC had not by then asked to be put on the Port's mailing list, and it was not sent notice of the DNS.

Notice of the DNS was published in a newspaper of general circulation on November 23, 1989.

IV

The GDNC did not comment on the DNS within the comment period.

V

The DNS was sent to the Muckleshoot Indian Tribe. The DNS was not sent to the Duwamish Indian Tribe.

The Duwamish are not a tribe that is recognized by the United States Secretary of the Interior.

VI

The Port applied to the City for a substantial development permit on December 2, 1988. Subsequently, on or about December 22, 1988, a large wooden sign, advising of the proposal, was put up adjacent to the site.

On December 29, 1988, and January 5, 1989, the City published notice of the permit application in a newspaper of general circulation. The notice called for comments by February 3, 1989. GDNC did not provide comment within the period allotted.

VII

On April 12, 1989, the City issued to the Port a substantial development permit for the transshipment facility project.

On May 3, 1989, GDNC appealed the City's decision to the state Shoreline Hearings Board.

On June 20, 1989, the City issued an addendum to its permit decision, analyzing the proposed riprap bulkhead for the project under the special use criteria of Section 23.60.032 of the Seattle Shoreline Master Program (SSMP). The City concluded that the bulkhead would be consistent with the special use criteria.

VIII

The site of the project is known as Terminal 108. Presently undeveloped, it consists of 5.25 acres of upland and 2.4 acres of aquatic area. The southern boundary of the tract is the end of Diagonal Avenue South where the street runs into the waterway. The property is the former site of a wastewater treatment facility. The southern portion is covered with asphalt. The northern part is unpaved and supports some grass and small bushes. Along the top of the bank where dredge spoils are piled, there are larger bushes and small trees, including madronas and willows.

IX

The site lies in what was a marshy wetland in the nineteenth century -- a part of a large island of which Kellogg Island is now a remnant. The project site was low-lying, probably subject to periodic tidal inundation.

Before the turn of the century, the natural character of the area began to change with the construction of dikes and reclamation of inundated properties. In the second decade of the twentieth century, the Duwamish Waterway was created by dredging and channelizing the estuary of the Duwamish River, eliminating much of the sinuosity of the stream course and creating upland where tideland had been.

The tract in question, over the intervening years, has been covered with some 8 to 11 feet of dredge spoils. Like most of the

1 neighborhood, it has changed dramatically from its natural state. Now  
2 it is in the midst of the City's major industrial area. It is zoned  
3 General Industrial I and is a part of the Urban Industrial shoreline  
4 environment.

5 Immediately to the south are the U.S. Army Corps of Engineers'  
6 offices and warehouses. To the east, between Terminal 108 and East  
7 Marginal Way is an 11 acre site used by Chevron USA for offices, truck  
8 parking and outside storage of industrial equipment. To the north is  
9 the Port of Seattle's Terminal 106 and the state Liquor Control Board  
10 warehouse.

11 Across the waterway is the Ideal Cement plant which includes  
12 marine loading docks, a cement kiln and silo, and bin storage areas  
13 for dry cement. To the west and north across the river are other  
14 industrial facilities.

15 To the west and south -- about 1,250 feet across the water from  
16 the project site -- is Kellogg Island, which has been set aside as a  
17 preserve for wildlife.

18 X

19 The project is to be developed by the Port and its tenant, the  
20 Lafarge Corporation.

21 Among the project features are:

22 a) grading, paving and drainage improvements on the southerly  
23 2.9 acres of the uplands;  
24  
25

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b) construction of four 100 foot high, 26 feet diameter bulk cement storage silos, approximately 220 feet from the shoreline;

c) construction of a barge moorage and loading area, including approximately five timber dolphins and a five foot wide, 270 foot long catwalk paralleling the barge berth and then connecting to the uplands at its south end;

d) a 30 foot high product transfer tower at the moorage berth connecting to a 10 inch diameter overhead pneumatic conveyor line for movement of bulk cement to the silo storage area;

e) construction of a rail siding and rail car loading facility,  
as well as a truck loading area and truck washdown pad;

f) extension of water, sewer and electrical utilities to the site;

g) installation of a rip rap bulkhead along about 650 lineal feet of bank above the intertidal area on the northern portion of the site.

XI

The facility is being built to accommodate the off-loading and transfer of cement shipped in by barge.

The use contemplated at the proposed facility requires a shoreline location. It is a water dependent use. It is compatible with other uses carried on in the urban industrial environment. The lot coverage proposed does not increase the 55% of the site now in paving. Some paving will be removed from areas dedicated to the public.

XII

The project will trigger the implementation of improvements to a planned public access site, involving the Diagonal Avenue South street and occupying approximately two-thirds of an acre of the Port's property in the southwesterly corner of Terminal 108, along the waterway.

The improvements include landscaping, removal of asphalt, installation of park benches, construction of a hand boat launch, providing parking spaces for approximately 16 cars, public access signs to let people know of the location and interpretive signs concerning the area.

XIII

The project, as approved, will also include an interim public path, extending northerly along the bank from the public access area to the catwalk at the south end of the barge moorage, a distance of about 200 feet. Along the intertidal area paralleling this path, riparian planting and beach enhancement are to be provided.

This 200-foot path is not to be permanently dedicated to public use, but it will likely remain open for a couple of years until needed for development purposes.

XIV

The permanent public access improvements triggered by the development implement the Comprehensive Public Access Plan for the



1 Duwamish Waterway adopted by the Port and the City after an elaborate  
2 planning process with extensive public involvement. The purpose was  
3 to replace the piecemeal permit-by-permit approach to public access in  
4 the waterway area with a coordinated, comprehensive approach. The  
5 result is more area devoted to access than was the case under ad hoc  
6 approach.

7 The Access Plan, at some length, addresses an existing unofficial  
8 public-created trail running the length of the bank at Terminal 108.  
9 This trail was expressly labelled as "interim" and was to be kept open  
10 by the Port until such time as the Port, at its discretion, decided to  
11 close it in connection with the development of the property.

12 The instant proposal will, in effect, result in the closure of  
13 all but the southerly 200 feet of the interim trail.

14 XV

15 We find that the project proposed will not require additional  
16 dredging of the channel. Moreover, the permit approval issued by the  
17 City is expressly limited by the understanding that no dredging or  
18 filling of the intertidal area will occur. No such activity is  
19 authorized by the approval given.

20 Lafarge is convinced that the barges they intend to use will be  
21 able to gain access to the moorage at mean lower low water (MLLW) when  
22 loaded. This is all they seek for their operation, and we were not  
23 persuaded that the facts are contrary to the company's understanding.  
24

XVI

Lafarge does not propose future site development which would necessitate dredging of the channel. Chevron has an easement across the northern portion of the Terminal 108 property, but any ideas Chevron may have for use of its easement at some future time are not part of the instant development proposal.

No showing was made that any even tentative plans exist for additional development on this shoreline locale. No showing was made that the instant project is only a part of a larger proposal or dependent in any way on other development.

XVII

The closest thing to dredging contemplated by this project is excavation work in connection with the proposed bulkhead. The bulkhead will be constructed above the tidelands with its lower edge at an elevation of +11.5 feet MLLW. Approximately 900 cubic yards of rip rap will be placed against the bank and the excavation will allow for its placement at the proper slope. Excavated bank sediments will be spread over the existing uplands on the northern portion of the site.

XVIII

The bankline along the northern portion of the property is eroding. In 1980 this bank was approximately straight. Now it is noticeably irregular. Along the length of the proposed bulkhead from 8 to 15 feet of bank have been lost since 1980.

1 We find that natural beach protection, as an alternative to rip  
2 rap, is not a practical alternative to prevent the extraordinary  
3 erosion which is occurring. The Department of Fisheries has issued a  
4 hydraulic project approval for the bulkhead.

5 XIX

6 South of the proposed bulkhead, there is a stable vegetated  
7 bankline, including riparian and emergent vegetation extending from  
8 the top of the bank into the intertidal area. This area will continue  
9 in vegetation alongside the 200-foot interim trail. The instant  
10 proposal involves no loss of marsh vegetation.

11 XX

12 When the facility is operational, the cement transfer from barge  
13 to silo will be through a fully enclosed system. The only possible  
14 escape routes for cement dust are from a vent on the top of each silo  
15 or by leakage during truck loading.

16 Dust baghouses are to be installed to control emissions from the  
17 silos. Loading spout and truck hatch design should prevent  
18 significant amounts of dust from escaping during loading.

19 The Puget Sound Air Pollution Control Agency has issued an Order  
20 of Approval for the project, indicating the agency's conclusion that  
21 the project will meet relevant requirements of air pollution control  
22 laws.

XXI

At the transfer facility, trucks will be washed down after loading. Wastewater from the washing operations will be routed to the METRO sanitary sewer. METRO has issued a discharge authorization for this activity, finding it to be a minor discharge.

The Department of Ecology has determined that no waste discharge permit is required for the stormwater drainage from the site, because there is no significant potential for contamination.

XXII

In the silos, shielding will be used to reduce noise emitted by compressors and blowers associated with the cement transfer system. Compressors and blowers at the barge off-loading end of the system will not be shielded.

However, given the extant background noise in the vicinity and the distance to off-site locales, we find that noise experienced by the public is not likely to be significantly increased from existing levels.

XXIII

It was not proven that construction or operation of the project would likely have an adverse effect on fish or wildlife at Kellogg Island or elsewhere.

XXIV

We find that the project, as proposed does not present the likelihood of a probable significant adverse effect on the environment.

XXV

The project site has not been identified by the City as an area potentially valuable for archaeological data. From what is known of the natural condition of the site, the area may have served as a part of the resource base of the native people who lived in the vicinity.

It was not proven that the site is likely to yield historically important archaeological information. Nevertheless, the Port has undertaken to perform an archaeological reconnaissance, involving field investigations and on-site excavations, of the area to be developed.

XXXVI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. From these Findings of Fact the Board reaches the following:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject matter. We conclude the GDNC is a "person aggrieved" within the meaning of RCW 90.58.180. Our conclusion does not rest on certification of the appeal by the Department of Ecology and Attorney General's office, but on the determination that GDNC has asserted specific and perceptible harm to some of its members, as well as injury within the zone of interest protected by the Shoreline

1 Management Act (SMA) and the State Environmental Policy Act (SEPA).  
2 SAVE v. Bothell, 89 Wn.2d 862, 576 P.2d 401 (1978); Sierra Club v.  
3 Morton, 405 U.W. 727 (1972); Deatley v. Yakima County, SHB No. 89-3  
4 (Order Granting Motion to Dismiss, March 30, 1989).

## 5 II

6 The GDNC has raised six issues in regard to the substantial  
7 development permit at issue, involving:

- 8 1) Procedural compliance with SEPA;
- 9 2) Substantive compliance with SEPA;
- 10 3) Special use criteria and the Seattle Shoreline Master Program  
11 (SSMP) in relation to the proposed bulkhead;
- 12 4) The need for dredging and, if needed, segmentation of project  
13 review under SEPA and the SMA;
- 14 5) Consistency of the approval with the SMA and SMP;
- 15 6) Consistency with SMA guidelines of actions relating to  
16 archaeological preservation.

## 17 III

18 We find no legal irregularity in the Port's failure to send the  
19 DNS to the Duwamish Indian Tribe. A DNS and checklist must be sent to  
20 (among others) "affected tribes." WAC 197-11-340(2)(b). Failure to  
21 comply with this requirement has resulted in reversal of the permit  
22 decision without a decision on the permit's merits. South Point  
23 Coalition v. Jefferson County, SHB No. 86-47.

1 But the definition of "affected tribe" covers only Indian tribes  
2 which are "federally recognized by the United States Secretary of  
3 Interior." WAC 197-11-710. Because such recognition has not been  
4 extended to the Duwamish, they are not an "affected tribe" covered by  
5 the requirement concerning mandatory circulation of a DNS.

6 Nevertheless, the Board, is concerned that the Duwamish Tribe was  
7 not directly consulted and provided timely information by the Port.  
8 The Duwamish River estuary is an important part of the historical  
9 homeland of the Tribe. Both evidence of the area's past and its use  
10 in the future are of substantial interest to the Tribe. The tribe's  
11 ability to effectively represent that interest is important to the  
12 cultural life of the Seattle community as a whole. The early exchange  
13 of information can improve the decision-making process. We are  
14 confident that the difficulties which sprang from a lapse of  
15 communications in this case will lead to a better communications in  
16 the future between the Port and the Tribe.

#### 17 IV

18 We conclude that the issuance of a DNS in this case was proper  
19 and lawful. On the record before us, the determination that there  
20 will be no probable significant adverse environmental impacts from the  
21 proposal was not shown to be incorrect as a matter of fact. WAC  
22 197-11-330 and 340. Recognizing our statutory duty to give  
23 substantial weight to the lead agency's determination, RCW 43.21C.090,  
24 we sustain the Port's threshold decision on its merits.  
25

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Having so decided, we decline to rule on the Port's contention the GDNC is precluded from objecting to the DNS under WAC 197-11-545(2) for failure to timely comment on it.

V

Having concluded that the issuance of the DNS was proper on the merits, we reject GDNC's claim that the permit approval in this case violated the substantive SEPA authority granted to the City of Seattle.

## VI

We conclude that the bulkhead proposal at issue is consistent with the special use approval criteria of the SSMP, Section 23.60.032.

Subject to compliance with these special use criteria, the bulkhead is permitted in the urban industrial environment if needed to support a water-dependent use or prevent erosion "when natural beach protection is not a practical alternative." SSMP, Section 23.60.842(B)(2). Because we have found that natural beach protection is not a practical alternative, the special use criteria must be applied.

These criteria are essentially the same as those applied generally by the Department of Ecology to shoreline conditional uses. WAC 173-14-140. What they add to the review of the instant approval is the requirement for compatibility of the project with other permitted uses within the area. We believe that, on this record, such compatibility is amply shown.



VII

Our finding that the need for additional dredging was not demonstrated, in effect, eliminates the contention that project review in this instance was improperly segmented. No future development plans were identified such that the environmental affects of them "can be meaningfully evaluated." See WAC 197-11-784; WAC 197-11-060(3)(b); Bucklin Hill Neighborhood Association v. DOE, PCHB 88-177 (June 10, 1989). Cf., Cathcart v. Snohomish County, 96 Wn.2d 201, 634 P.2d 853 (1981). (segmentation in EIS context)

VIII

Except as noted in Conclusion of Law X below, we conclude that the instant project is consistent with the policies of the SMA and the provisions of the SSMP.

We note particularly:

1. The proposed use fulfills policies that favor water-dependent port uses which promote navigation and are located in areas where development is already concentrated. RCW 90.58.020; Seattle Resolution No. 25173 (Economic Development goal and policies); Seattle Resolution No. 27618; Implementation Guidelines A2 (Duwamish area) and A3 (preferred uses); SSMP, Section 23.60.002.

2. The proposed use is a permitted use in the urban industrial environment. SSMP, Section 23.60.840(B)(6).

3. The proposed use conforms with the general development policies of SSMP, Section 23.60.152.

4. Substantial public access, involving significant improvements, is an integral part of the approval of this project, by virtue of compliance pertinent provisions of the Comprehensive Public Access Plan for the Duwamish Waterway. RCW 90.58.020, Seattle Resolution 27618, Implementation Guideline A6 (Urban Industrial Environment); SSMP, Section 23.60.160.

5. The specific development standards specified for the urban industrial environment are met. SSMP 23.60.870-882.

6. The development is consistent with control of pollution and prevention of damage to the natural environment. RCW 90.58.020.

## IX

In connection with public access here, we note with interest the adoption of a comprehensive planning approach. This kind of approach, preceding permit by permit consideration, exemplifies the very kind of rational forethought intended as the method for implementing the substantive policies of the SMP enunciated in RCW 90.58.020.

Moreover, we perceive no policy impediment to the closure of part of the interim public trail which now traverses the site. The Port and City were cautious and explicit when this interim trail was first recognized. Its interim recognition was not intended to provide an argument for its later being made permanent. Now that conflicting development is imminent, and public access is otherwise adequately

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1 addressed, the clearly foreshadowed closure should be allowed to  
2 occur. A contrary result would serve as a disincentive to agencies to  
3 establish interim access on sites eventually slated for development.  
4 In net effect the public would be the losers.

5 X

6 WAC 173-16-060(20) sets forth the Department of Ecology's  
7 guidelines for the development of local shoreline master programs in  
8 relation to archaeological areas and historic sites. We have often  
9 ruled that after adoption of an applicable master program and its  
10 approval by the Department, we do not review developments for  
11 conformity with chapter 173-16 WAC. E.g., Skagit System Cooperative  
12 v. Skagit County & DOE, SHB No. 88-14 (October 31, 1989).

13 The City's policy resolutions regarding the SSMP speak generally  
14 to the subject of historical and cultural preservation, but provide no  
15 specific requirements for processing individual permits. Seattle  
16 Resolutions 25173 (p. 13) and 27618 (p. 29). Nothing in the SSMP  
17 itself sets forth relevant standards.

18 Under the circumstances, we will regard Ecology's guidelines as  
19 expressive of the policies of the statute itself. As a first step,  
20 WAC 173-16-060(20) calls for the identification of areas of  
21 potentially valuable archaeological data:

22 . . . In areas known to contain archaeological data,  
23 local governments should attach a special condition to a  
24 shoreline permit providing for a site inspection and  
25 evaluation by an archaeologist to ensure that possible  
26 archaeological data are properly salvaged. . . .

1 The instant record is insufficient to demonstrate that the site  
2 in question does in fact contain archaeological data. But, the  
3 locational circumstances are such as to give rise to an obligation to  
4 investigate whether such data can be found.

5 Accordingly, we conclude that in order for the permit to conform  
6 to the policies of the SMA, a condition should be added as follows:

7 An archaeological reconnaissance, involving field  
8 investigations and on-site excavations of the area, where  
9 the original sediments will be excavated or penetrated by  
10 the project, must be conducted prior to any  
11 construction. A report of this reconnaissance shall be  
12 forwarded to the City of Seattle and to the State Office  
13 of Archaeology and Historic Preservation. Construction  
14 shall not commence until after fifteen days from the  
15 transmittal of the archaeological report.

## 16 XI

17 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
18 adopted as such.

19 From these Conclusions of Law the Board enters the following  
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ORDER

The substantial development permit issued by the City of Seattle to the Port of Seattle is affirmed, except as provided in Conclusion of Law X above. The matter is remanded to the City for issuance of a permit in conformity with this decision.

DONE this 9th day of November, 1989.

SHORELINES HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Presiding Officer

Judith A. Bendor

JUDITH A. BENDOR, Chair

Harold S. Zimmerman

HAROLD S. ZIMMERMAN, Member

Nancy Burnett

NANCY BURNETT, Member

William E. Derry

WILLIAM E. DERRY, Member

Robert L. Landles

ROBERT LANDLES, Member

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